Supreme Court, U.S.
FILED

No.

DEC 30 1993

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHNNY H. WATERS, ET AL.

Petitioners

v.

THE UNIVERSITY OF ALABAMA BIRMINGHAM MEDICAL CENTER, UNIVERSITY OF ALABAMA HOSPITALS, ET AL.

DR. H.M. REEVES, SELMA MEDICAL CENTER ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

ORAL ARGUMENT REQUESTED

JULIA McCAIN LAMPKIN ASAM, Ph.D.,J.D.

ATTORNEY AT LAW

P.O. BOX 591

NORTHPORT, ALABAMA 35476

(205) 333-1999

33pp

QUESTIONS PRESENTED

I. Whether Hon. Circuit Judge in Dallas County Alabama can circumvent the law on timely filing of affirmative defenses by himself two years after the case was transferred from Circuit Court of Jefferson County, suddenly grant a summary judgment claiming "nothing that shows that a personal representative has ever been appointed on behalf of the decedent"... when one of the petitioners was a 3-months old baby left by the decedent and is represented in this case by his father, Johnny Waters, also Petitioner, and the baby, Joseph Waters, rights to due process in the courts, and liberty rights under the 5th and 14th Amendments to the U.S. Constitution were violated by this untimely ruling without a hearing of a Circuit Judge in Dallas County, Ala., and also whether the judge ignored Alabama law cases concerning all parties to a pleading, Code of Alabama, §43-2-250 and Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898).

II. Whether Jeanne Carol Waters constitutional right to live and due process under the 5th and

QUESTIONS PRESENTED (CONTINUED)

14th Amendments to the U.S. Constitution were violated when a resident doctor, who had performed the same operation two times on patient/petitioner, and had her life support systems removed when he had no authorization from UAB Hospital or a court order after the patient/petitioner had been given drug Pavulon to induc unconsciousness?

III. Whether the civil rights [42 U.S.C. § 1983] were violated because of the constitutional rights of Jeanne Carol Waters were violated [5th and 14th Amendments to the U.S. Consitution and question of whether under 2-year or the 6-year statute of limitations because of trespass on the person as seen in the Alabama case [Beard v. Stevens, 372 F. 2d 685, (1987)] because Jeanne Carol Waters was assaulted and trespassed on her person by the can consider the merits of the case and rule as to the length of time this type of civil rights violation led to the premature and wrongful death of Jeanne Carol Waters, i.e.

BEST AVAILA

QUESTIONS PRESENTED (CONTINUED)

unauthorized pulling of her life support systems by resident doctors [doctors in training when she had been induced to be unconscious by a drug, Pavulon, causing her die [she lived approximately 2 hours after pulling life support system indicating she was not brain dead] after she had been induced to be unconscious by a drug, Pavulon, causing her to die?

IV.. Whether a hospital can bury their mistakes and wrong doings by their agents, resident doctors [doctors in training] with legal technicalities that infringe upon the U.S. Constitutional rights of Jeanne Carol Waters by violating her civil rights when she had a right to live under the 5th and 14th Amendments to U.S. Constitution.

BLE COPY

TABLE OF CONTENTS

	Page
Table of Contents	iv
Questions Presented for Review	i
Parties to the Proceeding	vi
Oral Argument Requested	vi
Citations of Authority	v
Opinions below	1
Jurisdiction	2
Statement of Case	3
Statement of the Facts	6
Reasons for Writ of Certiorari	11
Conclusion	23
Appendix	a-1

CITATIONS OF AUTHORITY

	Page
Bantam Books Inc. v. Sullivan, R.I., 1963, 83 S Ct 631, 372 U.S.58, 9 L. Ed 2d 584	16
Beard v. Stevens, 372 F. 2d 685 (1987)	ii,15,20,21
Blase v. Blase, Ala. Civ. App., 419 So. 2d 599 at 600, (1982)	11
DeStafney v. University of Alabama, 413 So. 2d 1281 (Ala. 1981)	3,19,21
Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979)	11,13
Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898)	i,13
Faulk v. Money, 236 Ala. 69, 181 So. 256 (1938)	13
Gayle v. Johnson, 72 Ala. 254 (1882)	13
Horwitt v. Horwitt, D.C. Conn. 1950, 90 F. Supp. 529	21

International Longshoremen's Association v. Davis, 470 So. 2d 1413 (Ala. 1985); International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed 2d 389, 106 S Ct 1904 (1986)..... 12

Jones v. Alabama State Docks, 443 So. 2d 902 (Ala. 1983) 14

Jones v. Preuit & Mauldin, 876 F. 2d 1480 (11th Cir. 1989) ... 15

Monell v. New York City Dept. of Soc. Serv. 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018 15,22

Owens and Lessard v. Okure 57 LW 4065 at 4069 15,16,18

Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 249 U.S. 389, 63 L. Ed. 662 9,17

Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) 20

QUESTIONS PRESENTED (CONTINUED)

PARTIES TO THE PROCEEDING

The Plaintiffs/Appellants/Petitioners are: Johnny H. Waters, Joseph H. Waters, and Jeanne Carol Waters.

The Defendants/Appellees/Repondents are: The University of Alabama Birmingham Medical Center, University of Alabama Hospitals, DR. H.M. REEVES AND SELMA MEDICAL CENTER

ORAL ARGUMENT REQUESTED

The Petitioner respectively requests that oral argument be allowed because of the complexity of the facts and the law in the instant case, and so that the Honorable Justices can ask questions.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHNNY H. WATERS, ET AL.

Petitioners

v.

THE UNIVERSITY OF ALABAMA BIRMINGHAM MEDICAL CENTER, UNIVERSITY OF ALABAMA HOSPITALS, ET AL.

DR. H.M. REEVES, SELMA MEDICAL CENTER ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Petitioner incorporates all statements which are stated in the Appendix as Opinions Below into this Writ of Certiorari.

JURISDICTION

Reversal and review is sought from the final decision from the Supreme Court of Alabama, the highest court in Alabama who originally denied the appeal. Jurisdiction i invoked under 28 U.S.C. § 1254 as Writ.

Constitutional Provisions involved

Amendment XIV of the Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of

BEST AVAIL

... property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

The original case was timely filed on Jan. 2, 1991, when the Complaint was filed with Exhibits (Vol. I, p. 1-25).

On March 11, 1991, the Plaintiffs attorney filed three volumes of medical records from the University of Alabama Hospitals, and other medical records (Vol. I, p. 52 through Vol. IV, p. 701, including autopsy reports.)

Threshold issue is on the DeStafney exception on person injury applies [DeStafney v. University of Alabama, 413 So. 2d 1281 (Ala. 1981)],

BLE COPY

and the instant case should be reversed and remanded to Jefferson County where the personal injury took place before the wrongful death of Jeanne Carol Waters which is the subject of this appeal. Jeanne Carol Waters died in Jefferson County Alabama [See Certificate of death, dated April 2, 1989, in Jefferson County, Alabama, Vol. III, p. 570].

Waters rights under the 5th and 14th Amendments of the right to live under the U.S. Constitution since her life was taken when the life support systems were pulled by the same resident doctor who had to performed the same operation two times at the UAB Hospital in Birmingham, Alabama.

The Petitioner points out the inconsistency of the law, especially on trespass of the person which is applicable in the instant case.

Jeanne Carol Waters was transferred from a Selma Hospital by air transport and Dr. Hipp performed an operation on her head and Dr. Hipp failed to use proper surgical technique and he failed to use peri-operative antibodies and she developed Staphyloccocus aureus and Dr. Hipp had to perform the same operation the second time. The point is that Dr. Hipp, a resident doctor [doctor in training] failed to contact his superior, a staff doctor at the hospital, and pulled the life support systems of Jeanne Carol Waters when she was not yet brain dead, and Dr. Hipp pulled the life support systems from Jeanne Carol Waters without authorization from the hospital, family or court order, which was the proximate cause of the premature and wrongful death of Jeanne Carol Waters. She had given normal birth to Joseph H. Waters, three months before she died.

Jeanne Carol Waters who had been induced to be unconscious with the drug Pavulon was unable to give permission to have her life support systems removed. In fact, Jeanne Carol Waters

was clearly assaulted and her person trespassed upon when the resident doctor without authorization from the hopsital, family or court order pulled the life support systems off Jeanne Carol Waters who had been induced to be unconscious and lived approximately 2 hours before she died showing she was not brain dead.

The Petitioner incorporates all statements in the "Statement of the Facts" into this section of the Brief.

STATEMENT OF THE FACTS

The Petitioner, Jeanne Carol Waters, had a right to live under the 5th and 14th Amendments to the U.S. Constitution, and when the resident doctors, Dr. Hipp and Dr. Austin-Vives pull the life support systems at UAB Hospital in Birmingham, without any authorization from the hospital or court order, the civil rights of Jeanne Carol Waters was violated under the 42 U.S.C. § 1983, especially since Jeanne Carol Waters had been induced to be unconsicious with the drug Pavulon.

The state law concerning sovereign immunity pursuant to Ala. Const. Art. I, § XIV (1901), was challeged when the State of Alabama was sued in the federal court, U.S. District Court, Middle District of Alabama, and appealed to the U.S. Court of Appeals, Eleventh Circuit.

The state of Alabama has conflicting law as to whether the two-year statute of limitations or six-year statute of limitations applies in the instant case because clearly Jeanne Carol Waters was trespassed on her person because she had been induced to be unconscious by the drug, Pavulon, before the life support systems were illegally pulled, i.e. Jeanne Carol Waters was assaulted when the life support systems were pulled by a resident doctor [doctor in training who had performed the same operation two times] and an employee of the University of Alabama Hospitals, Birmingham... and the resident doctor was reponsible for the personal injury and wrongful death of Jeanne Carol Waters due to the resident doctor

negligence and breach of acceptable standards of practice by pulling life support systems without any valid medical or legal reason and therefore the medical services were below standards in the community due to the UAB Hospital agents, servants and/or employees, including the negligence in the hiring by Dr. L. Clark Taylor, Jr.

It appears that the taking of the life by the hospital's agent, resident doctor, Dr. Hipp, who was in training, that caused Jeanne Carol Waters constitutional right to life under the 5th and 14th Amendment to the U.S. Constitution has been ignored by both state and federal courts below by the state court alleging a defense of sovereign immunity which was challenged in the federal court, and by the federal court alleging technicalities

The point is this case is now a case where state and federal legal technicalities are causing and infringing upon the constitutional right of Jeanne Carol Waters' right

to life under the 5th and 14th Amendments to the U.S. Constitution, and therefore, under federal law such as Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 249 U.S. 389, 63 L. Ed. 662, the federal constitutional rights should prevail.

The Dr. Reeves malpracticed Mrs. Waters while she was in Selma, Alabama by not taking precautions to prevent infection. Doctors at the Selma Medical Center failed to have lab tests on "green vomit" and other irregularities which was the reason Mrs. Waters was transferred to the UAB Hospital in Jefferson County, Alabama.

The lawyers for Dr. Reeves and Selma Medical Center failed to timely file answers and/or affirmative defenses which was a violation of Alabama procedural law [See Argument], and the Honorable Circuit Judge of Dallas County, Alabama after two years since transferred part

of case to Selma, Alabama, the judge suddenly circumvented the laws of Alabama procedural law and the judge himself wrote the order as seen in Appendix A to this Brief, and the Petitioners state this is a violation of the due process under the 5th and 14th Amendments to the U.S. Constitution.

The Writ of Certiorari should be granted and a merits brief allowed to be written, and then the instant case should be reversed and remanded with instructions on constitutional law to the trial court to be tried by a jury on all triable issues in the instant case.

REASONS FOR WRIT OF CERTIORARI

Questions I,II,III, and IV are discussed this section together since the bottom line is that the Petitioners have not had due process in any court which is a violation of the 5th and 14th Amendments to the U.S. Constitution.

The Honorable Judge in Dallas County Circuit Court [See Appendix A] untimely circumvented the law in Alabama concerning timely filing of affirmative defenses when the judge waited two-years after the instant case, part of which was transferred back to Selma, Alabama, to incorrectly rule according to a case Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979), which is not applicable in the instant case since the lawyers for both Dr. Reeves and Selma Medical Center failed to timely file answers and/or affirmative defenses. See Blase v. Blase, Ala. Civ. App. 419 So. 2d 599 at 600, (1982) which held that a general rule, affirmative defense is waived if it is not timely pleaded.

See Alabama Supreme court case which held that affirmative defenses were to be deemed waived if not affirmatively pleaded, International Longshoremen's Association v. Davis, 470 So. 2d 1413 (Ala. 1985); International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed 2d 389, 106 S Ct 1904 (1986). As a matter of law both Motions for Summary Judgment should have been stricken from record of the two lawyers representing the Selma section of this lawsuit because of failure to timely file affirmative defenses as to personal representative, instead of the Honorable Judge of the Circuit Court of Dallas County, in Selma, Alabama circumventing Alabama law on affirmative defenses and untimely ruling himself after two years as seen in order in Appendix A when the said Downtown case supra is not applicable as seen in Code of Alabama §43-2-2 as interpreted in the comments that administrator ad litem will not be appointed under this section

where all parties interested in the final settlement of the estate are before the court. [Emphasis added], which are the facts in this instant case. See Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898) discussing the origin of the section. See also Gayle V. Johnson, 72 Ala. 254 (1882), Faulk v. Money, 236 Ala. 69, 181 So. 256 (1938). See Code of Alabama, §43-8-41(3) showing the parties of interest are the spouse and the infant represented by the next of kin the father, which is distinguished from the Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979), which is concerned with a son suing in behalf of a parent. The infant son, Joseph Hugh Waters was only 3½ months old at the time of death of his mother which should toll wrongful death action.

The Supreme Court of Alabama has recently passed some time of procedural rules concerning ruling Affirmed with no opinion which further violates the due process rights in the instant case when a two-year sudden untimely filing of a judge instead of ruling on summary judgments

before him decides to circumvent the law on affirmative defenses as stated above and which were before him in "Motion to Strike... Motion for summary judgment... which pointed out that the lawyers had not timely filed answers and/o affirmative defenses.

This Writ of Certiorari should be granted and the Merits brief allowed to be written not only on the Selma part of this case but also the Birmingham part of this case. The bottom line is that no due process under the 5th and 14th amendments to the U.S. Constitution have been shown in any court in this instant case.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903 (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const. § 13.

Writ, showing violation of due process under 5th and 14th Amendments and civil rights.

The Appellant points out the inconsistency of the law, especially on trespass of the person which is applicable in the instant case.

See Beard v. Stevens, 372 F. 2d 685 (1987), which states, "Alabama six-year statute applicable to trepass applied to action against sheriff and deputies for alleged civil rights violations..."

This law in Beard case is in direct conflict with Owens v. Okure, 488 U.S. 235 (1988); Jones v. Preuit & Mauldin, 876 F. 2d 1480 (11th Cir. 1989); and Code of Alabama, § 6-2-38(1) (Supp. 1992), state law infringes upon the constitutional rights of Jeanne Carol Waters, right to live and due process under the 5th and 14th Amendments to the U.S. Constitution which triggers in the 42 U.S.C. § 1983 civil rights claim.

Monell v. New York City Dept. of Soc. Serv. 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018,

which states,

"Civil Rights § 12.5 -- Liability for violations -- state law immunities - 11a, 11b. State-law immunities do not override a cause of action under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of the federally protected rights."

See Owens and Lessard v. Okure, 57 LW 4065 at 4069 which states,

"We explained that the Civil Rights Acts provided: "[a] unique remedy making it appropriate to accord the statute a sweep as broad as its language.' Because the § 1983 remedy is one that can 'override certain kinds of state laws.' Monroe v. Pape, 365, U.S. 167, 173, (1961), and is in all events, supplementary to any remedy any State might have..."

Also see Bantam Books, Inc. v. Sullivan, R.I., 1963, 83 S Ct 631, 372 U.S. 58, 9 L. Ed 2d 584, which states,

"The Supreme Court's appellate jurisdiction was properly invoked, where the state court judgment sought to be reviewed upheld a state statute against contention that on its face and as applied, the statute violated the federal Constitution."

See Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 269 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judge by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void.] (Emphasis added.)

In the instant case, the same person, Dr. Hipp [Resident doctor] who had to operate on Jeanne Carol Waters two times for the same type of operation, induced unconsciousness by drug, Pavulon, and then he pulled the life support systems of Jeanne Carol Waters [not talking about allegedly pulled life support systems but actually pulled life systems and he signed his name in medical record of UAB] which was called wrongful death in this case but was actually MURDER I to cover his mistakes of having to operate two (2) times on Jeanne Carol Waters.

Jeanne Carol Waters was not brain dead but induced to be unconscious by drug, Pavulon, and she breathed from 9:20 A.M. to 11:00 A.M. on her own showing she was not brain dead after the unauthorized removal of her life support systems.

The UAB hospital tried to cover the death incident by producing heart record, EKG's, instead of EEG's and certainly Jeanne Carol Waters had a right to live under the 5th and 14th Amendments to the U.S. Constitution, and has not received due process in the judicial system with the Owens v. Okure, supra case.

The Owens v. Okure case supra, in Alabama is inconsistent with the trespass on the person 6-year statute in Beard case, quoted above, and especially since the Owens v. Okure case stands for the fact federal law can override certain state law. The Honorable Supreme Court of the United States should reinterpret this Owens v. Okure, as to the exception of trespass on the person, wrongful death, and/or MURDER I, when life support systems are pulled by resident doctor who was not authorized by the hospital, court order, or consent of the family.

There is a question whether wrongful death and/or trespass on the person (assault), and/or MURDER I, can toll the time of any statute of limitations when the patient, Jeanne carol Waters, was unconscious by drug induced Pavulon, and she could not give her consent.

Clearly, the Honorable trial judge made reversible error when the violation of Jeanne Carol Waters due process rights to live under the 5th and 14th Amendments to the U.S. Constitution, and he due process rights to be in the courts under the personal injury [trespass on the person], exception to the sovereign immunity of a state.

DeStafney Exception on Personal Injury

See DeStafney v. University of Alabama, 413 So. 2d 391, at 395 which states,

"Clearly, under the guidelines of Gill and Milton, a claim for personal injury based upon the alleged negligent conduct of a State employee, even when committed in the line and scope of employment, is not within the ambit of § 14's protection.

These constitutional violations trigger the 42 U.S.C. § 1983, and in the instant case, the 6-year statute of limitations is applicable because of trespass on person - See Beard v. Stevens, 372 F. 2d 685 (1987).

"Alabama six-year statute applicable to trespass applied to action against sheriff and deputies for alleged civil rights violations..."

See Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) on due process. There was no notice or hearing to pull the life support system of Jeanne Carol Waters [violation of her due process rights under the 5th and 14th amendments to U.S. Constitution, right to live], when the resident doctor had to perform the same operation two times on Jeanne Carol Waters and he decided to pull the life support systems without authorization from the hospital or any court, and she died a wrongful death. Secondly, the due

process rights under the 5th and 14th Amendments to the U.S. Constitutional right to live comes under the failure of the state court to recognize own law as to the exception to state immunity as to person injury when is met in the DeStafney case supra above exception. The third due process rights of Jeanne Carol Waters is violated when the 6-year statute of limitations as to trespass on the person was not observed as stated in the Beard case supra.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F. Supp. 529,

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

University of Alabama Hospital agents, resident doctors, violating the 5th and 14th amendments to the U.S. Constitution and triggered 42 U.S.C. § 1983 as to 3¼ months old of Jeanne carol Waters that was wrongfully deprived of his mother and there is no immunity for the University of Alabama Hospitals as

shown in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018, which states,

"Civil Rights § 12.5 -- liability for violations -- state law immunities - 11a,11b. State-law immunities do not override a cause of action under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of his federally protected rights."

CONCLUSION

The Writ of Certiorari should be granted for the above reasons, and the Petitioner should be allowed to write the Merits brief so that the instant case can be reversed and remanded to the trial court for all triable issues before a jury.

Respectively submitted,

Julia Asam

Julia Asam,
Attorney At Law
P.O. Box 591
Northport, Alabama 35476
205 - 333-1999

APPENDIX A

In the Circuit Court of Dallas County, Alabama

Johnny H. Waters, et al.

Plaintiffs,

vs. Case mp/ CV 91-125

Dr. H.M. Reeves, et al.

Defendants

ORDER

This cause is before the Court on the motion of the Defendants for summary judgment. The Court, having reviewed the file, finds nothing that shows that a personal representative has ever been appointed on behalf of the decedent to prosecute this wrongful death action. Accordingly, on the authority of Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala.1979) the motion for summary Judgment is granted and this cause is dismissed.

DONE and ORDERED this 19th day of March, 1993. [Entered March 23, 1993].

s/ Circuit Judge Meigs.

IN THE SUPREME COURT OF ALABAMA

JOHNNY H. WATERS, et al.

Plaintiffs,

vs. #1921163

DR. H.M. REEVES, et al.

Defendants.

AFFIRMED. No opinion.

JUSTICES HOUSTON, HORNSBY, MADDOX, SHORES, AND KENNEDY

August 27, 1993.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

JOHNNY H. WATERS, et al.

Plaintiffs,

vs. #1921163

Dr. H.M. Reeves, et al.

Defendants.

Application for rehearing overruled.

NO OPINION. October 1, 1993.

JUSTICES HOUSTON, HORNSBY, MADDOX, SHORES, AND KENNEDY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above Writ was sent to Mr. H.M. Treschsel, Office of Counsel, University of Alabama System, UAB Station, MJH, 112, Birmingham, Alabama 35294-2010, Mr. William Dudley Motlow, Jr., Porterfield, Harper & Mills, #2 Office Park Drive, Ste 1, P.O. Box 530790, Birmingham, Alabama 35253-0790, and Mr. Thomas H. Keene, Rushton, Stakely, Johnston & Garrett, P.O. Box 270, Montgomery, Alabama 36195 this 30 day of December, 1993.

Julia Asam

Supreme Court, U.S.
FILED
JAN 25 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

No. 93-1138

JOHNNY H. WATERS, ET AL.

Petitioners,

v.

DR. H. M. REEVES, ET AL.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

THOMAS H. KEENE
Rushton, Stakely, Johnston
& Garrett, P.A.
Post Office Box 270
Montgomery, Alabama 36101
Attorney for Respondent

TABLE OF CONTENTS

Table of Cases i

Statement of the Case 1

Argument 3

Conclusion 6

Certificate of Service 7

TABLE OF CASES

Code of Alabama, 1975, Section 6-5-410 1

28 U.S.C. Section 1257(3) 3

Johnny H. Waters, et al. v.
Dr. Steven Hipp and
Dr. Michael J. Rosner,
600 So. 2d 981 (Ala. 1992) 4

Downtown Nursing Home, Inc. v. Pool,
375 So. 2d 465 (Ala. 1979),
cert. denied, 445 U.S. 930 (1980) 4

Webb v. Webb, 451 U.S. 493,
68 L.Ed 2d 392, 101 S.Ct. 1889 (1981) 5

STATEMENT OF THE CASE

This wrongful death action was originally instituted in the Circuit Court of Jefferson County, Alabama, under the Alabama Wrongful Death Statute. Code of Alabama, 1975, Section 6-5-410. This defendant was joined with other defendants who were variously described as entities who took part at the University of Alabama in the care of the deceased. This defendant is a medical doctor who practices in Selma, Alabama. His treatment of the plaintiff occurred well before the death. The Circuit Court in Jefferson County dismissed all of the defendants who were residents of Jefferson County under the doctrine of Sovereign Immunity. The case was then transferred back to the Circuit Court of Dallas County, Alabama and was pending against this defendant and the Selma Medical Center.

This defendant filed a motion for summary judgment based on the fact that a duly appointed personal representative had not brought this wrongful death action as required by the law of Alabama. The only issue before the trial judge was whether that requirement of the Alabama Wrongful Death Act had been complied with. The trial court held that it had not and granted summary judgment in favor of all defendants. Plaintiffs took an appeal to the Supreme Court of

Alabama which affirmed the judgment of the trial court. This ruling by the Alabama Supreme Court was consistent with numerous Alabama decisions requiring that a duly appointed personal representative bring a wrongful death action within two years of the death.

No contention was raised before either the trial court or the Alabama Supreme Court that the requirement that a duly appointed personal representative of the estate must bring a wrongful death action within two years of the death violated the United States Constitution, treaties or other laws. The allegations before the trial court and before the Alabama Supreme Court related purely to matters of Alabama rules of procedure concerning how to properly raise this issue and further whether, in fact, this plaintiff had to meet the requirement that a duly appointed personal representative bring the wrongful death action within two years.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI IS DUE TO BE DENIED BECAUSE NO FEDERAL QUESTION IS PRESENTED.

This case involves very simply the interpretation of the Alabama Wrongful Death Statute and the manner in which it is properly presented to a trial court. There is no contention against this defendant that the requirement that a personal representative bring a wrongful death action within two years raises in any way a federal question, nor is there any allegation that the state statute conflicts or is repugnant to the Constitution of the United States, or the treaties or laws of the United States. Therefore, under 28 U.S.C. Section 1257(3), the Petition for Writ of Certiorari is due to be denied.

As to this particular defendant, there were no issues presented to the trial court or the Alabama Supreme Court about the right to die or the termination of life support systems as alleged in plaintiff's petition. This Court needs to be aware that those issues were directed to the defendants who were granted dismissals due to sovereign immunity. The only issue as to this defendant was whether the plaintiff met the Alabama statutory requirement to file this

wrongful death action by a duly appointed personal representative within two years of the death. In fact, when the Alabama Supreme Court considered the appeal involving this defendant, it had already decided against this same plaintiff who had taken a separate appeal against separate medical doctors on the same principles of law. Johnny H. Waters, et al. v. Dr. Steven Hipp and Dr. Michael J. Rosner, 600 So. 2d 981 (Ala. 1992). The Alabama Supreme Court in affirming the trial court in this case affirmed its previous decisions which merely state that to satisfy the provisions of the wrongful death statute, a personal representative must file the action within two years of the date of death. Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979), cert. denied, 445 U.S. 930 (1980). Interestingly, the Downtown Nursing Home, Inc. v. Pool case, *supra*, was another attempt by a prior plaintiff to seek certiorari on this very same issue, and this Honorable Court denied that attempt.

The sole issues presented to the trial court and the Alabama Supreme Court in this case involved whether a personal representative had been appointed within the two-year period to bring the case. Alabama has consistently held that the filing of an action by someone other than a duly appointed personal representative results in the attempted filing of suit being a nullity.

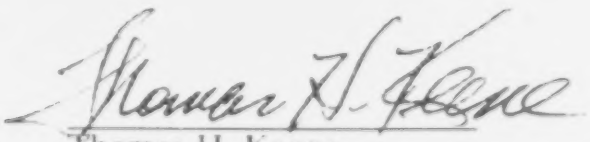
Downtown Nursing Home, Inc. v. Pool, *supra*, Waters v. Hipp and Rosner, *supra*. The personal representative must be the executor or administrator of the estate of the deceased pursuant to the cases cited above. In this case, the plaintiff never showed before the trial court that a personal representative had been appointed.

The trial court and the Supreme Court of Alabama in this particular case was faced with the argument by the plaintiff that the motion for summary judgment could not be considered because of plaintiff's contention that an answer must be first filed raising this defense. The second argument the plaintiff made was that in this case, the personal representative did not have to be the party bringing the suit. Both arguments were rejected by the trial court and the Alabama Supreme Court.

It is obvious that both of these issues involve interpretation of Alabama Rules of Civil Procedure and Alabama law. These issues have absolutely no relationship to the interpretation of the United States Constitution, its laws or treaties. Thus, this petition fails and is due to be denied. Webb v. Webb, 451 U.S. 493, 68 L.Ed 2d 392, 101 S.Ct. 1889 (1981).

CONCLUSION

Even giving the petitioner the benefit of the doubt in reading this very garbled Petition for Writ of Certiorari which combines two separate cases, the case against Dr. Reeves and the allegations made by the petitioner clearly fail to raise federal questions. No federal question was presented to the trial court in Alabama nor the Alabama Supreme Court as to these procedural and statutory questions of Alabama law. The petitioner is not now entitled to raise these questions before this Honorable Court. It is respectfully submitted that this petition is due to be denied.



Thomas H. Keene
Attorney for Respondent
Dr. H. M. Reeves

OF COUNSEL:

RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
Post Office Box 270
Montgomery, Alabama 36101-0270
(205) 834-8480

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served by U.S. Mail this 25 day of January, 1994 to:

Julia Asam, Esq.
Suite 10, North View Plaza
3120 McFarland Blvd.
Northport, Alabama 35476

W. Dudley Motlow, Jr., Esq.
Suite One, 2 Office Park Circle
P.O. Box 530790
Birmingham, Alabama 35253-0790

Of Counsel

(3)

Supreme Court, U.S.
FILED
FEB 14 1994
OFFICE OF THE CLERK

No. 93-1138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHNNY H. WATERS, ET AL.

Petitioners

v.

THE UNIVERSITY OF ALABAMA BIRMINGHAM MEDICAL CENTER, UNIVERSITY OF ALABAMA HOSPITALS, ET AL.
DR. H.M. REEVES, SELMA MEDICAL CENTER ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

SUPREME COURT OF ALABAMA

MOTION OBJECTING TO **FALSE STATEMENTS IN** "BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI..." AND RESPONSE AND **AMENDMENT** TO "PETITION FOR WRIT OF CERTIORARI"

JULIA McCAIN LAMPKIN ASAM, Ph.D.,J.D.
ATTORNEY AT LAW
P.O. BOX 591
NORTHPORT, ALABAMA 35476
(205) 333-1999

QUESTIONS PRESENTED

I. Whether Hon. Circuit Judge in Dallas County Alabama can circumvent the law on timely filing of affirmative defenses by himself two years after the case was transferred from Circuit Court of Jefferson County,suddenly grant a summary judgment claiming "nothing that shows that a personal representative has ever been appointed on behalf of the decedent"... when one of the petitioners was a 3-months old baby left by the decedent and is represented in this case by his father, Johnny Waters, also Petitioner, and the baby, Joseph Waters, rights to due process in the courts, and liberty rights under the 5th and 14th Amendments to the U.S. Constitution were violated by this untimely ruling without a hearing of a Circuit Judge in Dallas County,Ala., and also whether the judge ignored Alabama law cases concerning all parties to a pleading, Code of Alabama, §43-2-250 and Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898).

II. Whether Jeanne Carol Waters constitutional right to live and due process under the 5th and

14th Amendments to the U.S. Constitution were violated when a resident doctor, who had performed the same operation two times on patient/petitioner, and had her life support systems removed when he had no authorization from UAB Hospital or a court order after the patient/petitioner had been given drug Pavulon to induce unconsciousness?

III. Whether the civil rights [42 U.S.C. § 1983] were violated because of the constitutional rights of Jeanne Carol Waters were violated [5th and 14th Amendments to the U.S. Consitution and question of whether under 2-year or the 6-year statute of limitations because of trespass on the person as seen in the Alabama case [Beard v. Stevens, 372 F. 2d 685, (1987)] because Jeanne Carol Waters was assaulted and trespassed on her person by the can consider the merits of the case and rule as to the length of time this type of civil rights violation led to the premature and wrongful death of Jeanne Carol Waters, i.e.

unauthorized pulling of her life support systems by resident doctors [doctors in training when she had been induced to be unconscious by a drug, Pavulon, causing her die [she lived approximately 2 hours after pulling life support system indicating she was not brain dead] after she had been induced to be unconscious by a drug, Pavulon, causing her to die?

IV.. Whether a hospital can bury their mistakes and wrong doings by their agents, resident doctors [doctors in training] with legal technicalities that infringe upon the U.S. Constitutional rights of Jeanne Carol Waters by violating her civil rights when she had a right to live under the 5th and 14th Amendments to U.S. Constitution.

V. Whether Alabama wrongful death statute procedural rules [§6-5-410 Code of Alabama,1975] is repugant to U.S. Constitution because preventing due process under 5th and 14th Amendments to U.S. Constitution in the courts; however, exceptions to procedure when all parties in lawsuit. [See §43-2-250,Code of Alabama,1974,p.12]

TABLE OF CONTENTS

	Page
Table of Contents	iv
Questions Presented for Review	i
Parties to the Proceeding	vi
Oral Argument Requested	vi
Citations of Authority	v
Opinions below	1
Jurisdiction	2
Statement of Case	3
Statement of the Facts	5
Reasons for Writ of Certiorari	11
Conclusion	24
Appendix	a-1

CITATIONS OF AUTHORITY

	Page
Bantam Books Inc. v. Sullivan, R.I., 1963, 83 S Ct 631, 372 U.S.58, 9 L. Ed 2d 584	16
Beard v. Stevens, 372 F. 2d 685 (1987)	ii,15,20,21
Blase v. Blase, Ala. Civ. App., 419 So. 2d 599 at 600, (1982)	11
DeStafney v. University of Alabama, 413 So. 2d 1281 (Ala. 1981)	3,19,21
Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979)	11,13 23
Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898)	i,13
Faulk v. Money, 236 Ala. 69, 181 So. 256 (1938)	13
Gayle v. Johnson, 72 Ala. 254 (1882)	13
Horwitt v. Horwitt, D.C. Conn. 1950, 90 F. Supp. 529	21

International Longshoremen's Association v. Davis, 470 So. 2d 1413 (Ala. 1985); International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed 2d 389, 106 S Ct 1904 (1986)..... 12

Jones v. Alabama State Docks, 443 So. 2d 902 (Ala. 1983) 14

Jones v. Preuit & Mauldin, 876 F. 2d 1480 (11th Cir. 1989) ... 15

Monell v. New York City Dept. of Soc. Serv. 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018 15,22

Owens and Lessard v. Okure 57 LW 4065 at 4069 15,16,18

Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 249 U.S. 389, 63 L. Ed. 662 9,17

Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) 22,23 20

Other

Alabama Wrongful Death Statute §6-5-410, Code of Alabama, 1975 iii, 22 23

§43-2-250, Code of Alabama, 1975 12,22,23 [Exception to personal representative when all parties sue such as in instant case; see law pp. 12-13 this Brief].

PARTIES TO THE PROCEEDING

The Plaintiffs/Appellants/Petitioners are: Johnny H. Waters, Joseph H. Waters, and Jeanne Carol Waters.

The Defendants/Appellees/Repondents are: The University of Alabama Birmingham Medical Center, University of Alabama Hospitals, DR. H.M. REEVES AND SELMA MEDICAL CENTER

ORAL ARGUMENT REQUESTED

The Petitioner respectively requests that oral argument be allowed because of the complexity of the facts and the law in the instant case, and so that the Honorable Justices can ask questions.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHNNY H. WATERS, ET AL.

Petitioners

v.

THE UNIVERSITY OF ALABAMA BIRMINGHAM MEDICAL CENTER, UNIVERSITY OF ALABAMA HOSPITALS, ET AL.

DR. H.M. REEVES, SELMA MEDICAL CENTER ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM SUPREME COURT OF ALABAMA

OTION OBJECTING TO **FALSE STATEMENTS IN** "BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI..." AND RESPONSE AND **AMENDMENT** TO "PETITION FOR WRIT OF CERTIORARI"

OPINIONS BELOW

The Petitioner incorporates all statements which are stated in the Appendix as Opinions Below into this Writ of Certiorari.

BEST AVAILABLE COPY

JURISDICTION

Reversal and review is sought from the final decision from the Supreme Court of Alabama, the highest court in Alabama who originally denied the appeal. Jurisdiction is invoked under 28 U.S.C. § 1257 as Writ.

Constitutional Provisions involved

Amendment XIV of the Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of

BEST AVAIL

... property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

The original case was timely filed on Jan. 2, 1991, when the Complaint was filed with Exhibits (Vol. I, p. 1-25).

On March 11, 1991, the Plaintiffs attorney filed three volumes of medical records from the University of Alabama Hospitals, and other medical records (Vol. I, p. 52 through Vol. IV, p. 701, including autopsy reports.)

Threshold issue is on the DeStafney exception on person injury applies [DeStafney v. University of Alabama, 413 So. 2d 1281 (Ala. 1981)],

ABLE COPY

and the instant case should be reversed and remanded to Jefferson County where the personal injury took place before the wrongful death of Jeanne Carol Waters which is the subject of this appeal. Jeanne Carol Waters died in Jefferson County Alabama [See Certificate of death, dated April 2, 1989, in Jefferson County, Alabama, Vol. III, p. 570].

Waters rights under the 5th and 14th Amendments of the right to live under the U.S. Constitution since her life was taken when the life support systems were pulled by the same resident doctor who had to performed the same operation two times at the UAB Hospital in Birmingham, Alabama.

The Petitioner points out the inconsistency of the law, especially on trespass of the person which is applicable in the instant case.

The petitioner incorporates all statements in the Statement of the Case in the original Petition for Writ of Certiorari. The original record of CV 91-0014, the number of the original case is in Circuit Court of Jefferson County, and after part of case transferred

the remaining part of the case is found in the Circuit Court of Dallas County, Alabama, if the Honorable Court needs the original records of the instant case. The original case CV 90-91-0014 was also continued by filing in the U.S. District Court, Middle District of Alabama, and was later appealed, concerning constutional issues.

The bottom line is that the Plaintiffs/ Appellants/ Petitioners in this instant case have received no due process under the 5th and 14th amendments to the U.S. Constitution in any court.

STATEMENT OF THE FACTS

The Petitioner incorporates all facts filed in the original Petition for Writ of Certiorari into this instant Brief.

Mr. Keene represented Dr. Reeves from Selma, Alabama who was proximate cause of the terminal illness of Jeanne Carol Waters. Mr. Keene, the attorney for Dr. Reeves had no standing to make any type of affirmative defense in a summary

judgment since Dr. Reeves failed to file an answer or affirmative defenses, so the summary judgment by Dr. Reeves was a nullity; however, the Hon. Judge circumvented the law and personally decided to dismiss the case since no representative after the case had been timely filed on Jan. 2, 1991, when Jeanne Carol Waters date of death was April 2, 1989.

However, the Petitioner met the exception to a personal representative since all the parties sued in the lawsuit. Mr. Johnny Waters sued and in behalf of the 3½ month old baby,Joseph Waters, that Jeanne Carol Waters left after the wrongful death of her in the UAB Hospital in Birmingham. See law presented on pp. 12-13,§ 43-2-250, Code of Alabama, 1975, The Hon. Judge in Dallas County Circuit Court ignored the response to Mr. Keene's by attorney Asam.

The Wrongful Death Act was not the only issues before the Circuit Court of Dallas County as seen in the original Complaint and Amended

Complaint which will be discussed in a Merits Brief if Writ of Certiorari is granted. Therefore Mr. Keene made a false statement claiming "the only issue before the trial judge was whether the requirement of the Alabama Wrongful Death act had been complied with."

The instant case, originally known as CV 91-0014 was timely filed within the two yars statutory time in Jefferson County Alabama. The defendant, Dr. H.M. Reeives, whom Mr. Keene was his attorney, was the doctor in Selma who first malpracticed the deceased Jeanne carol Waters by using unsterile techniques in ~~Nose~~ Nose ft packing after a hemorrage of Mrs. Waters. The point is that Dr. Reeves failed to remove hugh blood clots from Mrs. Waters back of her nose, and this malpractice was one of the reasons that the deceased became terminally sick and had to be flown by helicopter to the UAB Hospital from Selma, Alabama, where she developed Staphacoccus aureus, a dangerous type of bacterium which can cause death. However, the medical problems became more complex after Jeanne Carol Waters arrived at UAB Hospital and the actual Wrongful death took place in the UAB Hospital as

described in the facts in the original Writ of Certiorari. Mr. Keene in his Opposition Petition failed to mention that he had no standing to raise an affirmative defense issue since Mr. Kenne failed to timely file an answer or affirmative defenses which were never filed in the case by Mr. Keene.

However, the instant case originally, CV-91-0014 in Jefferson county Circuit Court, was timely filed within the 2-years of the death of Jeanne Carol Waters and therefore was timely filed as to the Wrongful Death Act of Alabama. The Petitioenr has complained that the due process rights of Jeanne Carol Waters was violated in the courts below, and the Honorable Supreme Court of the U.S. can call up the records of the courts below. There is a clear contention that the lower court judge circumvented the law on affirmative defenses when the judge clearly erroneously granted summary judgment, and Jeanne Carol Waters' due process rights have been violated under the 5th and 14th Amendmnts to the U.S. Constitution since she has received no due process in any courts below.

The point is this case is now a case where state and federal legal technicalities are causing and infringing upon the constitutional right of Jeanne Carol Waters' right to life under the 5th and 14th Amendments to the U.S. Constitution, and therefore, under federal law such as Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 249 U.S. 389, 63 L. Ed. 662, the federal constitutional rights should prevail.

The lawyers for Dr. Reeves and Selma Medical Center failed to timely file answers and/or affirmative defenses which was a violation of Alabama procedural law [See Argument], and the Honorable Circuit Judge of Dallas County, Alabama after two years since transferred part of case to Selma, Alabama, the judge suddenly circumvented the laws of Alabama procedural law and the judge himself wrote the order as seen in Appendix A to this Brief, and the Petitioners state this is a violation of the due process under the 5th and 14th Amendments to the U.S. Constitution.

The Dr. Reeves malpracticed Mrs. Waters while she was in Selma, Alabama by not taking precautions to prevent infection. Doctors at the Selma Medical Center failed to have lab tests on "green vomit" and other irregularities which was the reason Mrs. Waters was transferred to the UAB Hospital in Jefferson County, Alabama.

The Writ of Certiorari should be granted and a merits brief allowed to be written, and then the instant case should be reversed and remanded with instructions on constitutional law to the trial court to be tried by a jury on all triable issues in the instant case.

REASONS FOR WRIT OF CERTIORARI

Questions I,II,III, and IV are discussed this section together since the bottom line is that the Petitioners have not had due process in any court which is a violation of the 5th and 14th Amendments to the U.S. Constitution.

The Honorable Judge in Dallas County Circuit Court [See Appendix A] untimely circumvented the law in Alabama concerning timely filing of affirmative defenses when the judge waited two-years after the instant case, part of which was transferred back to Selma, Alabama, to incorrectly rule according to a case Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979), which is not applicable in the instant case since the lawyers for both Dr. Reeves and Selma Medical Center failed to timely file answers and/or affirmative defenses. See Blase v. Blase, Ala. Civ. App. 419 So. 2d 599 at 600, (1982) which held that a general rule, affirmative defense is waived if it is not timely pleaded.

See Alabama Supreme court case which held that affirmative defenses were to be deemed waived if not affirmatively pleaded, International Longshoremen's Association v. Davis, 470 So. 2d 1413 (Ala. 1985); International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed 2d 389, 106 S Ct 1904 (1986). As a matter of law both Motions for Summary Judgment should have been stricken from record of the two lawyers representing the Selma section of this lawsuit because of failure to timely file affirmative defenses as to personal representative, instead of the Honorable Judge of the Circuit Court of Dallas County, in Selma, Alabama circumventing Alabama law on affirmative defenses and untimely ruling himself after two years as seen in order in Appendix A when the said Downtown case supra is not applicable as seen in Code of Alabama §43-2-250 as interpreted in the comments that administrator ad litem will not be appointed under this section

where all parties interested in the final settlement of the estate are before the court. [Emphasis added], which are the facts in this instant case. See Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898) discussing the origin of the section. See also Gayle V. Johnson, 72 Ala. 254 (1882), Faulk v. Money, 236 Ala. 69, 181 So. 256 (1938). See Code of Alabama, §43-8-41(3) showing the parties of interest are the spouse and the infant represented by the next of kin the father, which is distinguished from the Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979), which is concerned with a son suing in behalf of a parent. The infant son, Joseph Hugh Waters was only 3½ months old at the time of death of his mother which should toll wrongful death action.

The Supreme Court of Alabama has recently passed some time of procedural rules concerning ruling Affirmed with no opinion which further violates the due process rights in the instant case when a two-year sudden untimely filing of a judge instead of ruling on summary judgments

before him decides to circumvent the law on affirmative defenses as stated above and which were before him in "Motion to Strike... Motion for summary judgment... which pointed out that the lawyers had not timely filed answers and/or affirmative defenses.

This Writ of Certiorari should be granted and the Merits brief allowed to be written not only on the Selma part of this case but also the Birmingham part of this case. The bottom line is that no due process under the 5th and 14th amendments to the U.S. Constitution have been shown in any court in this instant case.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903 (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const. § 13.

Writ, showing violation of due process under 5th and 14th Amendments and civil rights.

The Appellant points out the inconsistency of the law, especially on trespass of the person which is applicable in the instant case.

See Beard v. Stevens, 372 F. 2d 685 (1987), which states, "Alabama six-year statute applicable to trepass applied to action against sheriff and deputies for alleged civil rights violations..."

This law in Beard case is in direct conflict with Owens v. Okure, 488 U.S. 235 (1988); Jones v. Preuit & Mauldin, 876 F. 2d 1480 (11th Cir. 1989); and Code of Alabama, § 6-2-38(1) (Supp. 1992), state law infringes upon the constitutional rights of Jeanne Carol Waters, right to live and due process under the 5th and 14th Amendments to the U.S. Constitution which triggers in the 42 U.S.C. § 1983 civil rights claim.

Monell v. New York City Dept. of Soc. Serv. 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018,

which states,

"Civil Rights § 12.5 -- Liability for violations -- state law immunities - 11a, 11b. State-law immunities do not override a cause of action under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of the federally protected rights."

See Owens and Lessard v. Okure, 57 LW 4065 at 4069 which states,

"We explained that the Civil Rights Acts provided: "[a] unique remedy making it appropriate to accord the statute a sweep as broad as its language.' Because the § 1983 remedy is one that can 'override certain kinds of state laws.' Monroe v. Pape, 365, U.S. 167, 173, (1961), and is in all events, supplementary to any remedy any State might have..."

Also see Bantam Books, Inc. v. Sullivan, R.I., 1963, 83 S Ct 631, 372 U.S. 58, 9 L. Ed 2d 584, which states,

"The Supreme Court's appellate jurisdiction was properly invoked, where the state court judgment sought to be reviewed upheld a state statute against contention that on its face and as applied, the statute violated the federal Constitution."

See Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 269 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judge by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void.] (Emphasis added.)

In the instant case, the same person, Dr. Hipp [Resident doctor] who had to operate on Jeanne Carol Waters two times for the same type of operation, induced unconsciousness by drug, Pavulon, and then he pulled the life support systems of Jeanne Carol Waters [not talking about allegedly pulled life support systems but actually pulled life systems and he signed his name in medical record of UAB] which was called wrongful death in this case but was actually MURDER I to cover his mistakes of having to operate two (2) times on Jeanne Carol Waters.

Jeanne Carol Waters was not brain dead but induced to be unconscious by drug, Pavulon, and she breathed from 9:20 A.M. to 11:00 A.M. on her own showing she was not brain dead after the unauthorized removal of her life support systems.

The UAB hospital tried to cover the death incident by producing heart record, EKG's, instead of EEG's and certainly Jeanne Carol Waters had a right to live under the 5th and 14th Amendments to the U.S. Constitution, and has not received due process in the judicial system with the Owens v. Okure, supra case.

The Owens v. Okure case supra, in Alabama is inconsistent with the trespass on the person 6-year statute in Beard case, quoted above, and especially since the Owens v. Okure case stands for the fact federal law can override certain state law. The Honorable Supreme Court of the United States should reinterpret this Owens v. Okure, as to the exception of trespass on the person, wrongful death, and/or MURDER I, when life support systems are pulled by resident doctor, who was not authorized by the hospital, court order, or consent of the family.

There is a question whether wrongful death and/or trespass on the person (assault), and/or MURDER I, can toll the time of any statute of limitations when the patient, Jeanne carol Waters, was unconscious by drug induced Pavulon, and she could not give her consent.

Clearly, the Honorable trial judge made reversible error when the violation of Jeanne Carol Waters due process rights to live under the 5th and 14th Amendments to the U.S. Constitution, and he due process rights to be in the courts under the personal injury [trespass on the person], exception to the sovereign immunity of a state.

DeStafney Exception on Personal Injury

See DeStafney v. University of Alabama, 413 So. 2d 391, at 395 which states,

"Clearly, under the guidelines of Gill and Milton, a claim for personal injury based upon the alleged negligent conduct of a State employee, even when committed in the line and scope of employment, is not within the ambit of § 14's protection.

These constitutional violations trigger the 42 U.S.C. § 1983, and in the instant case, the 6-year statute of limitations is applicable because of trespass on person - See Beard v. Stevens, 372 F. 2d 685 (1987).

"Alabama six-year statute applicable to trespass applied to action against sheriff and deputies for alleged civil rights violations..."

See Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) on due process. There was no notice or hearing to pull the life support system of Jeanne Carol Waters [violation of her due process rights under the 5th and 14th amendments to U.S. Constitution, right to live], when the resident doctor had to perform the same operation two times on Jeanne Carol Waters and he decided to pull the life support systems without authorization from the hospital or any court, and she died a wrongful death. Secondly, the due

process rights under the 5th and 14th Amendments to the U.S. Constitutional right to live comes under the failure of the state court to recognize own law as to the exception to state immunity as to person injury when is met in the DeStafney case supra above exception. The third due process rights of Jeanne Carol Waters is violated when the 6-year statute of limitations as to trespass on the person was not observed as stated in the Beard case supra.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F. Supp. 529,

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

University of Alabama Hospital agents, resident doctors, violating the 5th and 14th amendments to the U.S. Constitution and triggered 42 U.S.C. § 1983 as to 3½ months old of Jeanne carol Waters that was wrongfully deprived of his mother and there is no immunity for the University of Alabama Hospitals as

shown in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018, which states,

"Civil Rights § 12.5 -- liability for violations -- state law immunities - 11a,11b. State-law immunities do not override a cause of action under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of his federally protected rights." Incorporate all law above in #IV&V.]

V. Clearly, the Wrongful Death Statute of Alabama procedural rules [§6-5-410 Code of Alabama, 1975] concerning necessity of personal representative is repugnant to U.S. Constitution because preventing due process under 5th and 14th Amendments to U.S. Constitution in the courts [See Standard Oil Co. v. Graves, 1919, 49 S Ct 320, 269 U.S. 389, 63 L. Ed 662 quoted on p. 17, this Brief. See § 43-2-250, Code of Alabama, 1975, exception as to personal representative when all parties sue in lawsuit such as in the instant case, [See pp. 12-13 this Brief for law].

The Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979) and Waters v. Hipp, 600 So. 2d 981 (Ala.1992) concerning the necessity of a personal representative in a Wrongful Death act under §6-5-410, Code of Alabama, 1974, should be struck down as repugnant to the U.S. Constitution as seen in the Standard Oil Co. v. Graves, 1919, 49 S Ct 320, 269 U.S. 389, 63 L. Ed 662 as quoted on p. 17 of this brief, because of violation of the due process rights under the 5th and 14th Amendments to the Constitution of Plaintiffs who are proper parties in a Wrongful Death action. Compare §43-2-250, Code of Alabama, 1974, and law on pp. 12-13 of this brief, because as seen in Standard Oil case,supra,"if that is to violate the Constitution of the United States th law must be declared void." [Emphasis added.]

CONCLUSION

The Writ of Certiorari should be granted for the above reasons, and the Petitioner should be allowed to write the Merits brief so that the instant case can be reversed and remanded to the trial court for all triable issues before a jury.

Respectively submitted,

2/14/94 Julia Asam

Julia Asam,
Attorney At Law
P.O. Box 591
Northport, Alabama 35476
205 - 333-1999

APPENDIX A

In the Circuit Court of Dallas County, Alabama

Johnny H. Waters, et al.

Plaintiffs,

vs. Case mp/ CV 91-125

Dr. H.M. Reeves, et al.

Defendants

ORDER

This cause is before the Court on the motion of the Defendants for summary judgment. The Court, having reviewed the file, finds nothing that shows that a personal representative has ever been appointed on behalf of the decedent to prosecute this wrongful death action. Accordingly, on the authority of Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala.1979) the motion for summary Judgment is granted and this cause is dismissed.

DONE and ORDERED this 19th day of March, 1993. [Entered March 23, 1993].

s/ Circuit Judge Meigs.

IN THE SUPREME COURT OF ALABAMA

JOHNNY H. WATERS, et al.

Plaintiffs,

vs. #1921163

DR. H.M. REEVES, et al.

Defendants.

AFFIRMED. No opinion.

JUSTICES HOUSTON, HORNSBY, MADDOX, SHORES, AND KENNEDY

August 27, 1993.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

JOHNNY H. WATERS, et al.

Plaintiffs,

vs. #1921163

Dr. H.M. Reeves, et al.

Defendants.

Application for rehearing overruled.

NO OPINION. October 1, 1993.

JUSTICES HOUSTON, HORNSBY, MADDOX, SHORES, AND KENNEDY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above Writ was sent to Mr. H.M. Treschsel, Office of Counsel, University of Alabama System, UAB Station, MJH, 112, Birmingham, Alabama 35294-2010, Mr. William Dudley Motlow, Jr., Porterfield, Harper & Mills, 22 Office Park Drive, Ste 1, P.O. Box 530790, Birmingham, Alabama 35253-0790, and Mr. Thomas H. Keene, Rushton, Stakely, Johnston & Garrett, P.O. Box 270, Montgomery, Alabama 36195 this 14 day of February 1994.

Julia Asam